Public Prosecutor v Abd Razak bin Termizi @ Fudzil

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–74 OF 2005
JAMES FOONG, ZAINUN ALI AND VINCENT NG JJCA
22 MARCH 2010

Criminal Procedure — Dangerous drugs — Trafficking — Section 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') — Accused acquitted and discharged at end of prosecution's case — Defence not called — Uncertainty over exact location in car where drugs were found — Conflict between cautioned statement and prosecution's evidence — Car used by accused's wife and friends one day earlier — Whether sufficient circumstantial evidence to show accused had knowledge of drugs — Whether custody and control proved to invoke presumption under s 37(d) of the DDA

The respondent, who was charged with trafficking in 452.6g cannabis under s 39B(1)(a)of the Dangerous Drugs Act 1952 ('DDA'), was acquitted and discharged by the High Court at the end of the prosecution's case without his defence being called. The prosecution appealed the decision to the Court of Appeal on the ground the judge was wrong in not finding the respondent had possession of the drugs based on direct evidence and in failing to invoke s 37(d) of the DDA by which both possession and knowledge would have been presumed. The respondent was arrested during a raid mounted by a police party at the parking lot of a shopping complex. He had driven there in a car, parked and locked it and was walking some distance away from the car when the police arrested him and brought him back to the parked car. The police witness testified that when he opened the car's door he noticed an orange plastic package on the floor of the driver's seat. The package contained the cannabis. The trial judge acquitted and discharged the respondent, inter alia, on the ground the prosecution was unable to prove the exact location where the package was found. In his cautioned statement the respondent insisted the package was found by the police under the driver's seat. The police witnesses, however, testified it was found on the floor of the driver's seat but were uncertain whether it was at the brake pedal or the clutch. The trial judge also found that on the evening prior to the incident the respondent's wife, who owned the car, had used the car and ferried some of her friends in it and she was uncertain if they could have placed anything in the car. In view of the lack of other circumstantial evidence to prove possession the trial judge refused to invoke the presumption under s 37(d) of the DDA.

Held, dismissing the appeal:

(1) To prove possession by direct evidence there must be the physical and

mental element. The uncertainty of which part of the floor of the driver's seat the said drugs were placed cast doubts that the accused had actus reus to the drugs ie the physical possession of the drug (see paras 15 & 16).

(2) The car did not belong to the accused, nor did he have exclusive possession of it. Prior to the incident the car was used by the wife who had ferried some friends in it. Anyone of them could have placed such a package on the floor of the car and if the exact location of where it was placed could not be ascertained there was a high degree of probability the accused may not have been aware of the package when he drove the car just before his arrest (see para 17).

(3) There had to be convincing circumstantial evidence to prove the accused had knowledge that the package contained drugs. The prosecution had failed to satisfy this element necessary to succeed in the charge against the accused (see para 18).

(4) For s 37(d) of the DDA to be invoked the accused must be found to have had the drugs in custody or under his control. Neither of these elements had been proved for the presumption to be invoked (see para 19).

[Bahasa Malaysia summary

Responden, yang dituduh mengedar dadah kanabis sebanyak 452.6g di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'), telah dibebaskan dan dilepaskan oleh Mahkamah Tinggi pada akhir kes pihak pendakwaan tanpa pembelaannya dipanggil. Pihak pendakwaan merayu terhahap keputusan tersebut kepada Mahkamah Rayuan atas alasan hakim telah salah kerana tidak mendapati bahawa responden memiliki dadah tersebut berdasarkan keterangan terus dan kerana gagal untuk membangkitkan s 37(d) ADB di mana kedua-dua milikan dan pengetahuan boleh dianggap. Responden ditangkap semasa serbuan yang dijalankan oleh pihak polis di tempat letak kereta kompleks membeli belah. Dia ke sana dengan memandu kereta, meletakkan keretanya dan menguncinya dan berjalan beberapa langkah daripada kereta apabila polis menangkapnya dan membawa dia ke keretanya. Saksi polis memberi keterangan bahawa apabila dia membuka pintu kereta tersebut dia nampak paket plastik berwarna oren di atas lantai tempat duduk pemandu. Paket tersebut mengandungi kanabis. Hakim bicara membebaskan dan melepaskan responden, antara lain, atas alasan pihak pendakwaan tidak dapat membuktikan lokasi tepat di mana paket tersebut dijumpai. Di dalam pernyataan beramarannya responden menegaskan paket tersebut dijumpai oleh polis di bawah tempat duduk pemandu. Saksi polis, walau bagaimanapun, memberi keterangan ia dijumpai di atas lantai di bahagian tempat duduk pemandu tetapi tidak pasti sama ada ia di bahagian pedal brek atau klac. Hakim bicara juga mendapati bahawa pada malam sebelum kejadian tersebut isteri responden, pemilik kereta tersebut, telah menggunakan kereta tersebut, dan membawa beberapa kawannya di dalamnya dan dia tidak berapa pasti jika

mereka mungkin meletakkan apa-apa di dalam kereta. Memandangkan kekurangan keterangan keadaan lain untuk membuktikan milikan, hakim bicara menolak daripada membangkitkan anggapan di bawah s 37(d) ADB.

Diputuskan, menolak rayuan:

(1) Untuk membuktikan milikan melalui keterangan terus mesti terdapat unsur fizikal dan pemikiran. Ketidakpastian di bahagian mana lantai tempat duduk pemandu dadah tersebut diletakkan telah menimbulkan kesangsian bahawa tertuduh mempunyai actus reus kepada dadah tersebut iaitu milikan fizikal dadah tersebut (lihat perenggan 15 & 16).

(2) Kereta tersebut bukan milik tertuduh, dan dia juga tidak mempunyai milikan eksklusif terhadapnya. Sebelum kejadian kereta tersebut telah digunakan oleh isterinya yang membawa beberapa kawan di dalamnya. Salah seorang daripada mereka boleh meletakkan paket sedemikian di atas lantai kereta dan jika lokasi tepat di mana ia diletakkan tidak dapat dipastikan terdapat kebarangkalian tahap tinggi tertuduh tidak mengetahui mengenai paket tersebut semasa dia memandu kereta sebelum penangkapannya (lihat perenggan 17).

(3) Mesti terdapat keterangan keadaan yang meyakinkan untuk membuktikan tertuduh mempunyai pengetahuan bahawa paket mengandungi dadah. Pihak pendakwaan telah gagal untuk memuaskan unsur ini yang perlu untuk berjaya di dalam tuduhan terhadap tertuduh (lihat perenggan 18).

(4) Untuk s 37(d) ADB dibangkitkan tertuduh mesti didapati mempunyai dadah di dalam kawalan atau di bawah jagaannya. Kedua-dua unsur ini tidak dibuktikan untuk membangkitkan anggapan tersebut (lihat perenggan 19).]

Notes

For a case on trafficking, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1967

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d)

Appeal from: Criminal Trial No 45–41 of 2002 (High Court, Ipoh)

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Naran Singh (Naran Singh & Co) for the respondent.

James Foong JCA: (delivering judgement of court):

INTRODUCTION

[1] The respondent was charged as follows:

> Bahawa kamu pada 17.2.2002, jam lebih kurang 3.00 petang di tempat letak kereta sebelah kanan kompleks Megoplex, Kampung Rapat, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, bukan sebagai seprang yang diberi kuasa atau disifatkan sebagai seorang yang diberi kuasa di bawah Akta Dadah Berbahaya 1952 atau Peraturan yang telah dibuat di bawah Akta yang lama, telah didapati mengedar 452.6 gram cannabis dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the end of the prosecution case, the respondent was acquitted and discharged without his defence called. Dissatisfied with this decision of the High Court, the prosecution appealed to us. After hearing arguments from the learned deputy prosecutor and respondent's counsel, we dismissed the appeal. Below are our grounds.

BACKGROUND FACTS

[3] Before we proceed with our reasons, it is pertinent to disclose the background facts of this case.

[4] On 17 February 2002 at about 1.20pm, one Chief Inspector Ahmad Yanee ('PW6') briefed six police officers that on information received there is drug trafficking activity involving a Malay man who drives a Proton Iswara Aeroback bearing registration No AED 3897 and that such activity would be carried out at Megoplex Shopping Complex compound in Ipoh.

[5] A police party comprising of two groups arrived at Megoplex Shopping Complex at about 2.15pm and waited at various spots at the parking lot outside Megoplex Shopping Complex. About 45 minutes, at about 3pm, PW6 observed a car bearing the description contained in the information entered the parking lot and parked next to his car.

[6] A Malay man identified as the accused got out of the car. He locked the car by remote control. He then proceeded to the lower level of the parking lot. PW6 got out of his car and followed him. He also instructed two of his police officers who accompanied him to guard the accused's car.

[7] When the accused reached the staircase, PW6 and one D/Sjn Major Busra bin Abdul Kadir ('PW5') arrested the accused after a struggle. PW6 then recovered a bunch of keys from the accused's hand. PW6 together with the accused and PW5 returned to the place where the accused parked his car. Using the keys recovered from the accused, PW6 opened the door of the accused's car.

[8] PW6 said that when he opened the car door of the said car, he noticed an orange plastic package on the floor of the driver's seat. PW6 removed the package, opened it and found a block of compressed dried leaves wrapped in clear transparent plastic.

[9] Together with the accused, PW6 and his party returned to the police station and there handed to the investigating officer ('IO') in this case, one Chief Inspector Kamala Lydia ('PW8') the accused, the orange plastic package so found in the car and the bunch of keys recovered from the accused which opened the door of the said car.

[10] PW8 then conducted a thumbprint test on the orange plastic wrapping and on the block of compressed dried leaves. She found no traces of thumbprint on them. Subsequently, PW8 sent the orange plastic package together with its contents to the chemistry department and there the chemist analysed the content and confirmed that they are cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('DDA') with a nett weight of 452.6g.

[11] Thereafter the accused was charged with the offence as I stated earlier.

FINDING OF THE TRIAL JUDGE

[12] The trial judge acquitted the accused without calling for his defence on the following grounds:

(a) The prosecution was unable to prove the exact location where the said drugs were found. Though PW6 and PW5 had testified that the orange plastic package was found on the floor of the driver's seat, the trial judge was of the opinion that these witnesses were uncertain as to the exact spot where the drugs were found. They were uncertain whether it was at the brake pedal or the clutch.

This issue is pertinent for reason that the accused had in his cautioned statement made under s 37(d) of the Dangerous Drugs Act 1952 (DDA) insisted that the orange plastic package was found under the driver's seat.

(b) That prior to the accused using the car, the accused's wife, who was the registered owner of the car had also used the same. She had on the evening

of the 16 February 2002, travelled in the said car with her friends and she was uncertain whether they had placed anything in the car.

In view of the lack of other circumstancial evidence to prove possession, the trial judge refused to invoke s 37(d) of the DDA which says:

> 37 Presumptions
>
> In all proceedings under this Act or any regulation made thereunder —
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

That though there was a struggle between the police and the accused at the time of arrest, the trial judge refused to infer that this is a prove of guilt on the part of the accused.

CONTENTION OF THE APPELLANT

[13] Before us the learned deputy public prosecutor ('DPP') contended:

(a) that the trial judge has erred in not finding that the accused had possession of the said drugs in view of the evidence adduced; and

(b) that the trial judge has failed to invoke s 37(d) of the DDA.

OUR GROUNDS

[14] Possession of drugs can be proved by direct evidence or by presumption by s 37(d) of the DDA.

[15] To prove possession by direct evidence, there must be the physical and mental element and this is best described by Thompson J in the case of *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 where:

> Posession itself as regards the criminal law is described as follows in *Stephen's Digest* ((9th Ed) at p 304) —
>
> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be situated that he can deal with the thing as if it belonged to him, for example have it in his pocket

or have it lying in front of him on a table. It must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[16] We agree with the trial judge that in this particular instance, the uncertainty of which part of the floor of the driver's seat the said drugs were placed cast doubts that the accused had actus reus to the drugs ie the physical possession of the drug.

[17] It must be pointed out that the said car does not belong to the accused. The accused had no exclusive possession of it. In fact, prior to the incident, the said car was used by his wife who had ferried some of her friends in it. Anyone of them could have placed such a package on the floor of the car and if the exact location of where this package was placed cannot be ascertained, then there is a high degree of probability that the accused may not be aware of this package, when he drove the said car just before his arrest.

[18] To come to a conclusion that the accused had knowledge that the package contained drugs, there must be convincing circumstancial evidence to prove this fact. Given the circumstances of this case, we agree with the trial judge that the prosecution has failed to satisfy this element necessary to succeed in the charge against the accused.

[19] On the accusation that the trial judge has not invoked s 37(d) of the DDA, we are of the opinion that before this section can be invoked, the accused must be found to have had in custody or under his control the said drugs. But here, the element of custody or control has not been proved for this presumption to be evoked.

[20] For reasons aforesaid, we would dismiss this appeal.

Appeal dismissed.

Reported by Ashok Kumar